Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-972

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM SCHARRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
DEBORAH W. DAWSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12P

QUESTIONS PRESENTED

1. Whether the prosecutor's cross-examination of petitioner and the prosecutor's summation violated petitioner's due process rights under *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

2. Whether the jury instructions concerning the fair market value of certain property were sufficient.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Anderson v. *Charles*, 447 U.S. 404 (1980)	6, 7
Cupp v. *Naughton*, 414 U.S. 141 (1973)	7
Doyle v. *Ohio*, 426 U.S. 610 (1976)	5, 6
Miranda v. *Arizona*, 384 U.S. 436 (1966)	6
United States v. *Dyman*, 739 F.2d 762 (2d Cir. 1984), cert. denied, 469 U.S. 1193 (1985)	8
United States v. *Hale*, 422 U.S. 171 (1975)	6
United States v. *Wolfson*, 573 F.2d 216 (5th Cir. 1978)	8

Statutes:

18 U.S.C. 2	2
18 U.S.C. 371	2
26 U.S.C. 7201	2
26 U.S.C. 7206(2)	1

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-972

WILLIAM SCHARRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 826 F.2d 773 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1987. A petition for rehearing was denied on October 13, 1987 (Pet. App. A5-A6). The petition for a writ of certiorari was filed on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of aiding and assisting in the filing of false income tax returns, in violation of 26 U.S.C. 7206(2);

one count of aiding and abetting tax evasion, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner was sentenced to two concurrent terms of 18 months' imprisonment, to be followed by two concurrent five-year terms of probation. U.S. C.A. Br. 2-3. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at trial, which is not disputed, is set forth in the government's brief in the court of appeals. It establishes that on December 30, 1975, petitioner's co-defendant, Victor Posner, donated a 16-acre tract of undeveloped property to Miami Christian College. The next day, petitioner gave Posner an appraisal letter, valuing the property at $125,000 per acre. On December 29, 1978, Posner donated an adjacent 6-acre tract to the college. Petitioner thereafter gave Posner an appraisal letter stating that the value of that parcel was $175,000 per acre. Based upon petitioner's appraisals, Posner claimed a total of $3,050,000 in charitable contributions on his federal income tax returns. The evidence established, however, that the 16-acre tract was worth only about $33,000 per acre as of December 31, 1975, and that the 6-acre tract was worth only about $44,000 per acre as of December 29, 1978. The inflated appraisals allowed Posner to take more than $2,000,000 in unjustified deductions. The government also presented substantial evidence that petitioner knew that his appraisals were false. U.S. C.A. Br. 4-5.That evidence included petitioner's July 29, 1976, letter to Loren Felabom, the college's business manager, acknowledging that the appraisal of the 16-acre tract was "unrealistic" because it had been "developed for tax purposes."[1]

---

[1] The July 29 letter stated (U.S. C.A. Br. 12):

> Enclosed herewith is a copy of the preliminary appraisals which were delivered to Mr. Posner December 30, 1975. The backup

Petitioner's defense was that it was reasonable for him to believe, and he honestly did believe, that the highest and best use of the property was for commercial purposes. Based on that premise, he claimed that the two appraisals, which assumed that the parcels could be rezoned to permit commercial development, were fair and accurate. At trial, petitioner offered an innocent explanation of his July 29, 1976, letter to Felabom. He asserted that what he had meant in that letter was that the college could not realistically "get the property rezoned for commercial use * * * because they would have jeopardized their tax-free status as a college." "And in that sense," petitioner continued, "to put it on the books for a price they couldn't actually sell it for at that time was unrealistic." U.S. C.A. Br. 47. At a meeting with the prosecutor prior to trial, however, petitioner, after receiving *Miranda* warnings, stated only that the July 29 letter was "poorly worded" (*id.* at 46).

On cross-examination, the prosecutor asked petitioner if he had given the same explanation of the July 29 letter when he met with the government prior to trial. At that point, the trial court and petitioner engaged in the following colloquy (Pet. 17-18):

> Scharrer: I wanted to give Mr. Handel [*sic*] the same explanation I gave the Court today, but my attorney would not let me.

---

work has not been completed as yet; however, as soon as it is I'll send you a copy.

What we did was average the $1.5 million approximate figure with $2 million and came up with an average price of $1,750,000. This price is probably unrealistic inasmuch as it is being developed for tax purposes.

From a realistic market price I believe if we had to sell the property the amount of $50,000 an acre would probably be it.

If I can be of further service, please give me a call.

The Court: The answer is, though, at the time you didn't give the explanation, right, Mr. Scharrer?

Scharrer: That's correct. We just didn't answer it. My attorney said, "I will not permit my client to answer it."

The Court: All right. Let's move on.

The prosecutor also called attention during his summation to the discrepancy between petitioner's trial testimony and his earlier explanation of the July 29 letter.

In its instructions to the jury, the district court defined the terms "knowingly," "willfully" and "specific intent." The court then advised the jury that the "critical question" was (U.S. C.A. Br. 34):

> whether the Government has proved beyond a reasonable doubt that Mr. Scharrer did not honestly hold his stated opinions as to the fair market value of the land Mr. Posner gave and that he stated these opinions with the express purpose of assisting Mr. Posner in filing false and fraudulent returns.

The court also instructed the jury as follows (U.S. C.A. Br. 33):

> It is for you the jury to decide whether the evidence shows beyond a reasonable doubt that Mr. Posner and Mr. Scharrer knew that the $2 million fair market value claimed in 1975 and the $1,050,000 claimed in 1978 were inflated and thus were not the true and correct fair market value amount.

Regarding "fair market value," the court instructed as follows (Pet. 31-32):

> The rules and regulations of the Internal Revenue Service contain a definition for this term which you must apply. The rules say that fair market value is

the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell and both having a reasonable knowledge of all of the relevant facts, any appraisal must consider its highest and best use.

2. The court of appeals affirmed (Pet. App. A1-A4). The court held (*id.* at A4) that "[a] review of the trial court's instructions reveals that, as a whole, the court gave a sufficient instruction on the manner by which fair market value is determined, and defendant's intent." It observed (*ibid.*) that the jury had heard expert testimony on market value and that it "was instructed substantially as requested as to how to weigh the experts' opinions." The court also noted (*ibid.*) that petitioner's counsel had "freely argued" the issue of intent and the significance of a future rezoning of the property. Finally, the court found the other issues raised by petitioner on appeal to be without merit, including the claim that the prosecutor had improperly commented on petitioner's post-*Miranda* silence during his cross-examination and summation (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 23-29) that the prosecutor's cross-examination of him concerning the July 29 letter to Felabom violated the rule in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). The court of appeals correctly rejected that contention.

In the *Doyle* case, the prosecutor, over defense objection, was permitted by the trial court to question the defendants about why they had not given their innocent explanation of events to the police after their arrest. The prosecutor was also allowed to argue the defendants' post-

arrest silence to the jury. This Court held that the decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), "compel[led] rejection" of those forms of impeachment and argument. The Court observed that because *Miranda* warnings contain an implicit assurance "that silence will carry no penalty" (426 U.S. at 618), " 'it does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony' " (*id.* at 619, quoting *United States* v. *Hale,* 422 U.S. 171, 182-183 (1975) (White, J., concurring in the judgment)).

By contrast, where a defendant "voluntarily speaks after receiving *Miranda* warnings," he has "not been induced to remain silent" (*Anderson* v. *Charles,* 447 U.S. 404, 408 (1980)), and the rule in *Doyle* is not implicated. And where a defendant has made post-*Miranda* statements that are inconsistent with his testimony at trial, the prosecutor is free to draw attention to that inconsistency. In that event, the prosecutor's remarks are "not designed to draw meaning from silence" (447 U.S. at 409), but rather are intended to show that the defendant's earlier statements contradict his trial testimony.

The prosecutor's cross-examination and summation in this case did not violate the rule in *Doyle.*[2] Petitioner did not remain silent at the pretrial meeting with the government. Rather, he offered an explanation of the July 29

---

[2] Because the remarks were not error at all, we do not address the additional questions, raised by petitioner (Pet. 25-29), whether the harmless error standard applies to *Doyle* violations, whether the purported error in this case constituted a denial of due process, and whether a *Doyle* violation may be noticed as plain error in the absence of a sufficient objection.

letter that was inconsistent with his subsequent trial testimony. On cross-examination, the prosecutor sought to underscore that inconsistency, and he emphasized the point in summation. At no time did the prosecutor comment on silence. The prosecutor's questioning and summation were therefore permissible under this Court's decision in *Anderson* v. *Charles, supra.*

2. Petitioner argues (Pet. 29-35) that the court of appeals erroneously held that arguments of counsel may substitute for proper jury instructions, and that the trial court erroneously rejected certain of petitioner's requested jury charges. Both claims are meritless.

First, the court of appeals did not hold that a lawyer's argument to a jury may obviate the need for proper jury instructions. Indeed, the court made clear (Pet. App. A4) that it had "review[ed] * * * the trial court's instructions" and concluded that "as a whole, the court gave a sufficient instruction on the manner by which fair market value is determined, and defendant's intent." In passing, the court suggested (*ibid.*) that the significance of the instructions could not have been lost on the jury, since petitioner's counsel had "freely argued" the issue of intent and the possibility that the parcels could be rezoned. The court did not, however, hold that those arguments were an appropriate substitute for proper jury instructions.

Second, the trial court's instructions were correct, as the court of appeals held. The only contested issue at trial was petitioner's state of mind. The court carefully instructed the jury on the definition of fair market value and meticulously explained how that issue affected the question of intent. Taken as a whole, those instructions were entirely sufficient. See *Cupp* v. *Naughton,* 414 U.S. 141, 146-147 (1973). Nor is there any merit to petitioner's claim (Pet. 19-21) that the trial court erred in failing to give his requested instruction on "distress sales." The trial court

advised the jury that the government had to prove beyond a reasonable doubt that petitioner "did not honestly hold his stated opinions as to the fair market value of the land" (U.S. C.A. Br. 34), and the court further instructed that "fair market value is the price at which the property would change hands between a willing buyer and a willing seller *neither being under any compulsion to buy or sell*" (Pet. 31 (emphasis added)). Those instructions were plainly sufficient to enable the jury to assess the claim that the property had been offered for sale under conditions of financial distress. A defendant is not entitled to the exact language of the charge that he submits as long as the court's instruction fairly conveys to the jury the point of law in issue, as was done in this case. See *United States* v. *Dyman*, 739 F.2d 762, 771 (2d Cir. 1984), cert. denied, 469 U.S. 1193 (1985).[3]

---

[3] Petitioner's reliance (Pet. 29-30, 32-34) on *United States* v. *Wolfson*, 573 F.2d 216 (5th Cir. 1978), is misplaced. In *Wolfson*, the trial court instructed the jury that in determining the weight to be given to the actual cost or sales price as a measure of fair market value, "[a] forced or distress sale should be accorded less weight in your consideration" (573 F.2d at 220). The court of appeals, in holding that instruction to be insufficient, could not find "[i]n light of the extensive evidence that the[] sales had little bearing on market value, * * * that this single sentence, using the legal jargon of 'forced or distress,' set in the midst of largely irrelevant instructions, was sufficient" (*ibid.* (footnote omitted)). In the present case, by contrast, there is no suggestion that the college's offer to sell the parcels was "largely irrelevant" to the question of market value. Moreover, the trial court carefully avoided the use of "legal jargon" and instructed the jury instead that " 'fair market value is the price at which the property would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or sell.' " (Pet. 31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
DEBORAH W. DAWSON
Attorneys

FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60283